UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HEIDI LANGAN, on behalf of herself and all others similarly situated, Plaintiff, v. JOHNSON & JOHNSON CONSUMER COMPANIES, INC., Defendant.	Civil Action No. 3:13-CV-01471-JAM May 27, 2019

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS AND APPROVAL OF CLASS NOTICE

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I. INTRODUCTION

Plaintiff Heidi Langan hereby submits this Memorandum of Law in support of her Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Class Notice.

Plaintiff brought this consumer-products class action in 2013 to challenge the sale and marketing of Aveeno® Baby Wash and Shampoo (the "Wash Products") and Aveeno® Baby Calming Comfort Bath baby wash (the "Bath Products") products (collectively the "Covered Products"), which Defendant, Johnson & Johnson Consumer Companies, Inc.'s ("Defendant"), labelled "Natural Oat Formula," even though the Covered Products are comprised of unnatural synthetic ingredients with imperceptible amounts of natural ingredients. Plaintiff claimed the labels were materially false and misleading, in violation of Connecticut's Unfair Trade Practice Law and similar laws in other states, because they suggested that the products were all natural. Defendant, in contrast, asserted that "Natural Oat Formula" was only meant to convey that the oat in the formula was natural. Plaintiff sought relief and damages for purchasers of the Covered Products up until November of 2012 and November of 2013, when the "Natural Oat Formula" representation on the labels was replaced.

After half a decade of litigation, which included significant investigation, extensive motion practice and discovery, and an appeal to the Second Circuit, the Parties,[1] with the assistance of an independent mediator, Professor Eric Green, agreed to settle the Class's claims for two million four hundred thousand dollars ($2,400,000), which is roughly 60 percent of the damages to the

[1] Plaintiff and Defendant will be referenced collectively herein as the "Parties." All capitalized terms used herein have the meanings set forth and defined in the Settlement Agreement (the "SA"). A true and accurate copy of the SA and its exhibits, Exhibit A and Exhibits 1-5 to Exhibit A, are attached to the Declaration of Mark P. Kindall ("Kindall Decl."), which is attached hereto.

Class estimated by Plaintiff's expert. As set forth more fully below, this is an excellent result for the Class and merits approval.

II. BACKGROUND

A. Summary of Litigation

On October 7, 2013, Plaintiff filed her Complaint in the United States District Court for the District of Connecticut, entitled *Langan v. Johnson & Johnson Consumer Companies*, Inc., No. 3:13-cv-01471.[2] The Complaint alleged violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), as well as violations of thirty other consumer protection statutes. *See* ECF No. 1. Subsequently, on November 27, 2013, Plaintiff filed an Amended Complaint reducing the number of consumer protection statutes claimed to have been violated to twenty-one. *See* ECF No. 12.

On January 24, 2014, Defendant moved to dismiss the Amended Complaint. *See* ECF No. 23. Plaintiff filed a Memorandum in Opposition, and on May 12, 2014, the Court denied Defendant's Motion to Dismiss. *See* ECF No. 30; *see also* ECF No. 37 at 2. Defendant filed its Answer to Plaintiff's Amended Complaint on July 1, 2014. *See* ECF No. 39.

From July 2014 until August 2015, the Parties engaged in extensive discovery. This included review and analysis, by Plaintiff's counsel, of over 100,000 pages of documents produced by Defendant, and depositions of several witnesses, including Plaintiff and her experts, Dr. Elizabeth Howlett and Colin B. Weir. *See* ECF No. 69 at 3; *see also* Declaration of Mark P. Kindall Supporting Plaintiff's Motion for Final Approval of Class Action Settlement and Motion

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[2] This followed an initial filing in the United States District Court for the District of New Jersey on January 25, 2013, entitled *Virgil and Langan v. Johnson & Johnson Consumer Companies, Inc.*, Case No. 3:13-cv-00524-MLC-DEA, which was voluntarily discontinued with prejudice on September 30, 2013.

for an Award of Attorneys' Fees and Expenses and a Lead Plaintiff Service Award (hereinafter, "Kindall Decl."), ¶ 3. Defendant also retained several experts to produce reports on consumer marketing and damages, each of whom was deposed. ECF No. 69 at 3.

On August 3, 2015, Plaintiff moved for class certification.[3] *See* ECF No.'s 66 and 67. On September 21, 2015, Defendant filed its opposition to Plaintiff's Motion for Class Certification along with motions to exclude the testimony of Plaintiff's experts. *See* ECF No.'s 78, 83, and 85. In turn, on October 15, 2015, Plaintiff filed her Reply in Further Support of Motion for Class Certification and oppositions to Defendants' motions to exclude. *See* ECF No.'s 105, 106, and 107. On November 18, 2015, the Parties both filed motions for summary judgment. *See* ECF No.'s 128 and 137. On December 11, 2015, the Parties filed their oppositions to the motions for summary judgment. *See* ECF No.'s 147 and 148.

In an Omnibus Ruling, this Court denied the motions for summary judgment, denied the motions to exclude the testimony of Plaintiff's experts, and certified the following class:

> All purchasers of the Aveeno Baby Brand Wash and Shampoo until November of 2012 and Aveeno Baby Brand Calming Comfort Bath baby wash until November of 2013, beginning on the following dates in the following states: in Alaska from January 25, 2011; in California, Connecticut, Delaware, the District of Colombia, Illinois, New York, and Wisconsin from January 25, 2010; in Florida, Hawaii, Massachusetts, and Washington from January 25, 2009; in Arkansas and Missouri from January 25, 2008; in Michigan, New Jersey, and Vermont from January 25, 2007; in Rhode Island from January 25, 2003 . . . . Specifically excluded from this Class are: the Defendant, the officers, directors and employees of Defendant; any entity in which Defendant has a controlling interest; any affiliate, legal representative of Defendant; the judge to whom this case is assigned and any member of the judge's immediate family; and any heirs, assigns and successors of any of the above persons or organizations in their capacity as such.

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[3] Plaintiff moved for certification of two alternate classes under Federal Rule of Civil Procedure 23(a) and (b)(3); one class relating to Connecticut only and the other relating to seventeen states and the District of Columbia.

See ECF No. 168 (March 13, 2017). Defendant petitioned the United States Court of Appeals for the Second Circuit for permission to appeal the class certification order, which was granted. *See Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 91 (2d Cir. 2018). The Second Circuit concluded that "whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing." *Id.* at 96. However, the court vacated this Court's grant of class certification and remanded the case, requesting a more thorough analysis of the variations in state consumer protection law. *Id.* at 98.

B. Summary of Settlement Discussions

Settlement was only reached in this case after multiple efforts. In July 2014, after the Court had denied Defendant's Motion to Dismiss and the parties were engaged in discovery, the Court referred the case to Magistrate Judge Martinez for purposes of conducting a settlement conference. ECF No. 46. At the request of the Parties, the conference was put off multiple times. ECF No.'s 48, 53, 56, 58, and 63. In October 2015, the Parties finally exchanged mediation submissions, but after a ten-minute telephone call on October 21, during which the Parties indicated that Settlement discussions were unlikely to be productive until the then-pending class certification motion was decided, the Magistrate Judge cancelled the scheduled mediation altogether. ECF Nos. 114–15; *see also* Kindall Decl., ¶ 4.

Following the issuance of the Court's Omnibus Ruling on March 13, 2017, (ECF No. 168), the Parties agreed to engage in settlement discussions and retained an experienced and highly regarded private mediator, Professor Eric Green. *Id.,* ¶ 5. The Parties again prepared and exchanged mediation submissions and attended an all-day in-person mediation session in New York City on May 8, 2017. *Id.,* ¶ 6. The Parties were unable to reach agreement at the May 8, 2017 mediation but agreed to continue working on possible settlement terms with the assistance of Professor Green. *Id.,* ¶ 7. However, when the Second Circuit accepted Defendant's Rule 23(f)

petition, Defendant indicated that further discussions would have to await the outcome of the appeal. *Id.,* ¶ 8.

Settlement discussions did not resume until after the Second Circuit handed down its decision in July of 2018. *Id.*, ¶ 9. The Parties scheduled another in-person mediation session with Professor Green for September 14, 2018. *Id.*; *see also* ECF Nos. 178 and 181. However, the Parties failed to reach agreement at that session as well. Kindall Decl., ¶ 9. Again, the Parties agreed to continue their negotiations, and exchanged additional offers and counteroffers through Professor Green in the weeks following in the September 14, 2018 mediation. *Id.*, ¶ 10. Ultimately, Professor Green made a mediator's proposal of $2.4 million, which the Parties accepted on October 2, 2018. *Id*. Negotiation of the final text of the SA took over a month, but the agreement was signed by all parties on November 27, 2018, and submitted to the Court for preliminary approval on December 17, 2018. *Id.*; *see also* ECF No. 187.

On February 4, 2019, the Court issued an order that preliminarily approved the proposed Settlement and certified the proposed Settlement Class. ECF No. 188 (the "PA Order"). The PA Order authorized the methods and forms of notice to the Settlement Class and set a schedule for briefing motions for final approval and for attorneys' fees, expenses and a service award, submitting objections, filing claims, or opting out of the Settlement. *Id.* Finally, the PA Order scheduled a final approval hearing for July 1, 2019 at 2:00 pm. *Id.*, ¶ 8. The Court subsequently continued the final approval hearing to July 10, 2019 at 1:00 pm. ECF No. 192.

C. Summary of the Proposed Settlement

For purposes of Settlement only, Defendant stipulated to certification of a Settlement Class comprised of persons who purchased the Covered Products — in the specified jurisdictions and during the specified times — covered by this Court's March 13, 2017 Class Certification Order. Specifically, the Settlement Class was defined as follows:

> [A]ll persons and each of their respective spouses, executors, representatives, heirs, successors, bankruptcy trustees, guardians, wards, agents, and assigns (in their capacity as such), and all those who claim through them or who assert duplicative claims for relief on their behalf, who purchased the Wash Products until November of 2012 and the Bath Products until November of 2013, beginning on the following dates in the following states: in Alaska from January 25, 2011; in California, Connecticut, Delaware, the District of Colombia, Illinois, New York and Wisconsin from January 25, 2010; in Florida, Hawaii, Massachusetts, and Washington from January 25, 2009; in Arkansas and Missouri from January 25, 2008; in Michigan, New Jersey, and Vermont from January 25, 2007; and in Rhode Island from January 25, 2003. Excluded from the Settlement Class are current and former officers and directors of Defendant, members of the immediate families of the officers and directors of Defendant, Defendant's legal representatives, heirs, successors, or assigns, and any entity in which they have or have had a controlling interest, and the judicial officer to whom this lawsuit is assigned.

ECF No. 168; *see also* SA at 2–3.

Pursuant to the SA, Defendant will contribute $2.4 million to a "Settlement Fund." *Id.* at 12. After payment of notice and claims administration expenses, service awards, and attorneys' fees and expenses, all as approved by the Court, the Settlement Fund will be used to pay Eligible Claims. *Id.* at 14. Class Members who properly and timely submit the Claim Form may recover one dollar ($1.00) for each purchase up to fifteen (15) Covered Products per household, without the need to submit proof of purchase. *Id.* at 13–14. There is no maximum number of Covered Products for which any Settlement Class Member may claim with proof of purchase. *Id.* at 14. In exchange for these benefits, Class Members will release Defendant from any and all claims "arising out of or relating to the allegations in the Action concerning [Defendant's] labeling, marketing, advertising, packaging, and/or promotion of the Covered Products." *Id.* at 25. Any amounts remaining in the Settlement Fund shall be distributed to Nurse-Family Partnership as a *cy pres* recipient. *Id*. at 15. No funds will be returned to Defendant (i.e. the "Settlement Fund is non-reversionary"). *Id.* at 10.

The Settlement provides that Class Counsel may apply to the Court for an award of attorneys' fees not to exceed thirty percent (30%) of the Settlement Fund, as well as an award for reimbursement of litigation expenses. *See id.* at 27. Additionally, Class Counsel may apply for a Lead Plaintiff's Service Award in the amount of five thousand dollars ($5,000) to be paid from the Settlement Fund. *Id.*

D. Notice and Reaction of the Settlement Class

The Notice Plan that was developed by Plaintiff and the Settlement Administrator, JND Legal Administration ("JND"), and approved by the Court in the PA Order, was designed to address the reality that here, as in many similar consumer class actions, individual notice to each class member is not feasible because Defendant does not have records showing the purchasers of the Covered Products, much less their contact information. *See In re Initial Pub. Offering Securities Litig.*, 671 F. Supp. 2d 467, 488 n. 159 (S.D.N.Y. 2009) (finding "the Second Circuit has held that 'each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members.'") (quoting *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)).

To ensure Notice reached at least 70% of the Settlement Class, JND placed banner advertisements on Facebook because 78% of Aveeno customers visit Facebook within 30 days and are 22% more likely to visit Facebook as compared to the general population. *See* Ex. 4 of the SA, ECF No. 187-5; Declaration of Jennifer M. Keough Regarding Implementation of the Notice and Claims Administration Program ("Keough Decl."), ¶ 9. JND also employed the Google Ad Display Network, which can reach 90% of internet users. *Id.*, ¶ 8. When keywords relating to the case were searched, a paid ad with a hyperlink to the case website appeared on the search engine results page. *Id.*, ¶12. The ads ran from February 15, 2019 through April 12, 2019 and generated 141,984 click-throughs. *Id.*, ¶¶ 11–14. JND also issued a nationwide press release on February

21, 2019 to 11,000 English and 150 Spanish media outlets to assist in getting "word of mouth" out about the litigation. *Id.*, ¶ 16.

JND provided a Settlement Website, http://www.aveenowashsettlement.com/, where Class Members could get additional information and fill out online claim forms, as well as toll-free telephone support. *Id.*, ¶¶ 19–22; *see also* the SA, ECF No. 187-1, at 10–11. The Settlement Website went live on February 14, 2019. Keough Decl., ¶ 22. The Settlement Website and the Class Notice could be viewed in either English or Spanish, which was also true of the online claim form available on the Website. *Id.*, ¶ 22. As of May 15, 2019, the Settlement Website has received 213,049 unique visitors, with total website page views exceeding 580,000. *Id.*, ¶ 24. Moreover, 190 people called the toll-free telephone support number. *Id.*, ¶ 21.

The response by the Settlement Class has been positive and substantial. Class Members have until June 17, 2019, to file claim forms, object, or opt out of the Settlement, so the numbers are not final at this time. However, to date, over 80,220 claims have been filed. *Id.*, ¶ 30. As of May 15, 2019, only one (1) Class Member has opted out of the Settlement (*id.*, ¶ 26), and the court docket indicates that no Class Members have filed objections (*id.*, ¶ 28).

III. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

As discussed, this Court certified the Settlement Class in its Omnibus Ruling, finding that it met all of the requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b)(3). *See Langan v. Johnson & Johnson Consumer Companies, Inc.,* 2017 WL 985640, at *12-13 (D. Conn. Mar. 13, 2017). On Appeal, Defendant argued that the proposed class did not satisfy the implied requirement of ascertainability, that Plaintiff lacked standing to represent purchasers in states other than Connecticut, and that, even if Plaintiff had standing, differences in state consumer protection laws defeated predominance under Rule 23(b). *Langan v. Johnson & Johnson Consumer Companies, Inc.,* 897 F.3d 88, 91 & n.2 (2d Cir. 2018). The Second Circuit

upheld the Court's determinations with respect to both standing and ascertainability. *Id.* at 92 n.2 and 96. However, the Second Circuit found the Omnibus Ruling did not sufficiently articulate the reasons for determining that potential differences in state consumer protection laws did not defeat predominance and thus preclude certification under Rule 23(b)(3). *Id.* at 98–99. Notably, the court acknowledged that "[v]ariations in state laws do not necessarily prevent a class from satisfying the predominance requirement." *Id.* at 97.

The Second Circuit's remand was expressly limited to "whether, under the circumstances of this case, state law similarities or differences will predominate . . . ." *Id.* at 99. Accordingly, there is no need to revisit whether the proposed Settlement Class meets the implied requirement of ascertainability, the four requirements of Rule 23(a), or Rule 23(b) superiority. Even with respect to the predominance inquiry, the scope of the remand was limited. This Court rightly found, as part of its predominance analysis, that the central issues in the litigation — whether the label claim was both deceptive and material to reasonable consumers — were susceptible to class-wide proof. *Langan,* 2017 WL 985640, at *13. This is unsurprising, since "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud." *Amchem Products Inc. v. Windsor,* 521 U.S. 591, 625 (1997).[4] These findings were undisturbed on appeal, and thus the remand focused solely on the possible effect of differences in consumer protection laws on the predominance inquiry.

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[4] The express language of Rule 23(b)(3) does not require that common questions be exclusive; it requires only that they predominate. *See Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (Predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."). In such cases, the court's inquiry is focused on "the conduct of the defendant rather than that of individual plaintiffs, making it particularly susceptible to common, generalized proof." *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1115 (E.D.N.Y. 2006).

The definition of the Class in the present motion is substantively the same as the definition the Court certified in the Omnibus Ruling. However, Plaintiff now seeks certification of this Class for settlement purposes only. When "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem,* 521 U.S. at 620.[5] Therefore, "variations [in state laws] are irrelevant to certification of a settlement class since a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 303–04 (3d Cir. 2011) (quotations and citations omitted). The *Sullivan* court went on to find that considering variations in state laws "in the context of predominance has primarily focused on manageability of a litigation class." *Id.* at 304. Parties should be careful that they do not "conflate the predicate predominance analysis for certification of a settlement class with that required for certification of a litigation class." *Id.* Moreover, any concerns about variations in state law should be assuaged by the fact that Settlement Class members can opt out of the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–11 (1985).

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[5] The *Amchem* Court noted that "other specifications of the Rule — those designed to protect absentees by blocking unwarranted or overbroad class definitions" — require close attention, even in the context of settlement. However, *Amchem* involved a nationwide class of people seeking money damages arising from their exposure to asbestos. The Supreme Court held that the named parties were not adequate representatives of the class as a whole because some class members had immediate medical needs while others had long-term needs for medical monitoring — thus making the financial interests of those with current illnesses directly antagonistic to those in need of monitoring. *See Amchem*, 521 U.S. at 626. The conflicts that existed among the *Amchem* class do not exist within the proposed Class here, which seeks only monetary relief for a common injury stemming from a misrepresentation. Further, there is no issue of overbroad class definitions in this case because the Class Period is limited as a result of Defendant's relabeling of the Covered Products in 2012 and 2013.

In the context of a settlement class, therefore, it is even more true that the "crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013). Defendant's arguments to the Second Circuit regarding the variations in state law largely concerned manageability issues, which are irrelevant in the present context of settlement. For example, while some states have different provisions with respect to the availability of attorneys' fees and trial by jury, such differences are not material because the claims of every member will not "rise or fall on the resolution of [those] question[s]." *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) (Reversing a district court's decision to deny certification of a class of persons in eight states because all eight states' consumer protection laws included at least one common requirement: that the defendant's statement about its product be either literally false or likely to mislead a reasonable consumer).

Here, the consumer protection laws of the states in the proposed class all provide private right of action to consumers who are injured as a result of a deceptive practice, such as purchasing products that purport to provide benefits that they do not actually possess.[6] Although there are variations in the laws, in the context of the facts of this case, the differences are not significant.

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[6] *See* Alaska: Alaska Stat. Ann. § 45.50.531. Arkansas: Ark. Code Ann. § 4-88-108. California: Cal. Civ. Code § 1780. Connecticut: Conn. Gen. Stat. Ann. § 42-110g. District of Columbia: D.C. Code § 28-3905. Florida: Fla. Stat. Ann. § 501.211. Hawaii: Haw. Rev. Stat. § 480-2. Illinois: 815 ILCS 505/10a. Massachusetts: Mass. Gen. Laws Ann. ch. 93A, § 9. Michigan: Mich. Comp. Laws Ann. § 445.911 (3). Missouri: Mo. Ann. Stat. § 407.025. New Jersey – N.J. Stat. Ann. § 56:8-2. New York: N.Y. Gen. Bus. Law § 349 (h). Rhode Island: R.I. Gen. Laws Ann. § 6-13.1-5.2. Vermont: Vt. Stat. Ann. tit. 9, § 2461. Washington: Wash. Rev. Code Ann. § 19.86.090. Wisconsin: Wis. Stat. Ann. § 100.18. Delaware does not codify the private right of action in a separate statutory provision. However, the Delaware Supreme Court has held that Del. Code Ann. Tit. 6, § 2513 "manifests a clear legislative intent that a consumer who has been damaged by a violation of § 2513 may assert a private cause of action." *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975).

Liability under each of the statutes turns on an objectively false or misleading representation — one that is likely to mislead reasonable consumers.[7] To recover damages, plaintiffs must also show that they suffered a loss that was caused by the misrepresentation; this can be done on a class-wide basis when the representation at issue is ***material*** — that is, one likely to affect consumer decisions — rather than by proof that the individual members of the class relied upon the representation.[8] And, as this Court determined, Plaintiff "identified internal documents

[7] *See, e.g., Borgen v. A & M Motors, Inc.,* 273 P.3d 575, 590 (Alaska 2012); *Philip Morris Companies, Inc. v. Miner,* 2015 Ark. 73, *8 (2015); *Paduano v. Am. Honda Motor Co., Inc.*, 88 Cal. Rptr. 3d 90, 126 (Cal. App. 4th Dist. 2009); *Caldor, Inc. v. Heslin,* 215 Conn. 590, 597 (1990); *State ex rel. Brady v. Publishers Clearing House,* 787 A.2d 111, 116 (Del. Ch. 2001); *Pearson v. Chung,* 961 A.2d 1067, 1075 (D.C. 2008); *PNR, Inc. v. Beacon Prop. Mgmt., Inc.,* 842 So.2d 773, 777 (Fla. 2003); *Courbat v. Dahana Ranch, Inc.,* 111 Haw. 254, 262 (2006); *Mednick v. Precor, Inc.,* 2017 WL 1021994, at *7 (N.D. Ill. Mar. 16, 2017); *Com. v. AmCan Enterprises, Inc.,* 47 Mass. App. Ct. 330, 335–36 (1999); *Evans v. Ameriquest Mortg. Co.,* 2003 WL 734169, at *4 (Mich. Ct. App. Mar. 4, 2003); Mo. Code Regs. Ann. tit. 15, § 60-9.020; *Hoffman v. Loiry,* 2016 WL 3693957, at *8 (N.J. Super. Ct. App. Div. Jul. 13, 2016); *Stutman v. Chem. Bank,* 95 N.Y.2d 24, 29 (2000); *Long v. Dell, Inc.,* 93 A.3d 988, 1003 (R.I. 2014); *Greene v. Stevens Gas Serv.,* 177 Vt. 90, 97 (2004); *State v. Mandatory Poster Agency, Inc.,* 398 P.3d 1271, 1277 (Wash. Ct. App. 2017).

[8] *In re Pharm. Indus. Average Wholesale Price Litig.,* 252 F.R.D. 83, 97-98 (D. Mass. 2008) (finding that the consumer protection laws of states including Arkansas, Connecticut, Delaware, D.C., Florida, Hawaii, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, Rhode Island, Vermont and Washington did not require individual reliance). The *AWP* court did not consider Wisconsin because its statute had unique provisions with respect to advertisement of wholesale prices (which was the subject of the litigation). *Id.* at 95 n.9. With respect to California, the court declined to determine that reliance was not required because the California Supreme Court had granted review in two cases that might clarify the issue. *Id.* at 99. The California Supreme Court subsequently held that material misrepresentations establish the necessary causal connection under California law and there is no requirement for individual class member reliance. *See In re Tobacco II Cases,* 46 Cal. 4th 298, 327 (2009).

For additional caselaw, *see Borgen,* 273 P.3d at 592 (Alaska does not require actual reliance; court upheld a damages award that was based on a simple comparison of the value of what was received compared to the value of what was represented); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 983 (C.D. Cal. 2015), *aff'd sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) (CLRA "allows plaintiffs to establish materiality and reliance (i.e., causation and injury) by showing that a reasonable person would have considered the defendant's representation material"); *Langan*, 2017 WL 985640, at *8 (reliance not required; under Connecticut statute, damages for material misrepresentations could be shown by the amount of overcharge attributable to the representation); *PB Prop. Mgmt., Inc. v. Goodman Mfg. Co., L.P.,* 2016 WL 7666179, at *18 (M.D.

from [D]efendant that show that [D]efendant itself recognized that consumers are willing to pay a premium for natural products," which "alone is powerful evidence that the labeling claims were material in general across the class of consumers." *Langan,* 2017 WL 985640, at * 13.

Caselaw in 15 of the jurisdictions is equally clear that intent to deceive is not an element of the claim.[9] Michigan does not require an "intent to deceive" where there is "purposeful conduct." *Westfield Ins. Co. v. D & G Dollar Zone*, 2013 WL 951086, *5 (Mich. Ct. App. Feb. 28,

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Fla. May 12, 2016) (To demonstrate causation, a plaintiff need not plead actual, subjective reliance on the alleged misrepresentation or omission.); *Yokoyama v. Midland Nat. Life Ins. Co.,* 594 F.3d 1087, 1093 (9th Cir. 2010) (reversing, *inter alia,* District Court's determination that individual reliance was necessary to establish causation under Hawaii's statute); *Rikos v. Procter & Gamble Co.,* 799 F.3d 497, 514–15 (6th Cir. 2015) (causation under Illinois statute susceptible of classwide proof where representation was material); *Baker v. Goldman Sachs & Co.,* 2013 WL 2540025, **7 (D. Mass. Jun. 11, 2013) (proof of actual reliance not required to show causal relationship between the misrepresentation and the injury to the plaintiff); *In re Packaged Seafood Prod. Antitrust Litig.,* 2017 WL 1010329, at *21 (S.D. Cal. Mar. 14, 2017) (Reliance and causation may be satisfied under the Michigan consumer protection law by demonstrating that plaintiffs purchased and consumed the product); *Hughes v. The Ester C Co.,* 317 F.R.D. 333, 351 (E.D.N.Y. 2016) (individualized proof of reliance and causation not required to obtain damages under Missouri statute*);* *Ebin v. Kangadis Food Inc.,* 297 F.R.D. 561, 568 (S.D.N.Y. 2014) (causation satisfied under NY and NJ statutes by showing that misrepresentation caused the price to be inflated; individualized reasons for making purchase were, accordingly, not relevant); *Peabody v. P.J.'s Auto Vill., Inc.,* 153 Vt. 55, 58 (1989) (plaintiff only required to show that deception is "likely to influence a consumer's conduct"); *In re: Premera Blue Cross Customer Data Sec. Breach Litig.,* 2017 WL 539578, at *4–5 (D. Or. Feb. 9, 2017) (individualized proof of reliance not required under Washington statute to show causation where substantially identical representations are made to all plaintiffs); *Novell v. Migliaccio,* 309 Wis. 2d 132, 151 (2008) (reliance not an element).

[9] *Borgen,* 273 P.3d at 590 (Alaska); *Curtis Lumber Co., Inc. v. Louisiana Pac. Corp*., 618 F.3d 762, 779 (8th Cir. 2010) (Arkansas); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005) (California); *Associated Investment Co. Ltd. Partnership v. William Associates IV,* 230 Conn. 148, 158 (1994) (Connecticut); *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del. 1983) (Delaware); *Grayson v. AT & T Corp.,* 15 A.3d 219, 251 (D.C. 2011) (District of Columbia); *Gavron v. Weather Shield Mfg., Inc.,* 819 F. Supp. 2d 1297, 1302 (S.D. Fla. 2011) (Florida); *Courbat,* 111 Haw. at 262 (Hawaii); *Swanson v. Bankers Life Co.,* 389 Mass. 345, 349 (1983) (Massachusetts); *Scanio v. Zale Delaware, Inc.,* 2012 WL 368741, *1 (E.D. Mo. Feb. 3, 2012) (Missouri); *Arcand v. Brother Int'l Corp.,* 673 F. Supp. 2d 282, 297 (D.N.J. 2009) (New Jersey); *Stutman,* 95 N.Y.2d at 29 (New York); *Long,* 93 A.3d at 988 (Rhode Island); *Gregory v. Poulin Auto Sales, Inc.,* 191-92 Vt. 611, 613 (2012) (Vermont); *Riensche v. Cingular Wireless, LLC,* 496 F. App'x 760, 763 (9th Cir. 2012) (Washington).

2013) *appeal denied*, 836 N.W.2d 689 (Mich. 2013). Where claims "all stem from the same pattern of misrepresentation . . . they all are actionable under the Consumer Protection Act." *Dix v. Am. Bankers Life Assur. Co. of Florida,* 429 Mich. 410, 418 (1987). Since there is no question that the "all natural" misrepresentations were not accidental, purposeful conduct is not an issue here. Similarly, while Illinois requires that a statement be made with intent that others will rely on it and Wisconsin requires intent to induce an obligation, there is no other reason to ***make*** label representations. Differences in state laws only impair predominance if they are significant in the context of the case. *See, e.g., In re Pharm.,* 252 F.R.D. at 100 (finding that small variations with respect to scienter did not pose significant issues "in the context of plaintiff's theory in this case.").

Based on the facts at issue in this case — a challenge to misrepresentations on the front label of every product, to which every consumer who purchased the product necessarily was exposed — the state laws at issue are all materially the same. Even if the case had gone to trial, the differences that exist between the language of each of the statutes would not have undermined predominance because the central questions affecting liability under each statute are the same in these circumstances. In the context of the Settlement Class, it is even more apparent that the differences in state laws do not defeat a finding of predominance. Accordingly, the Court should certify the Settlement Class.

The Court should also confirm the appointment of Lead Plaintiff Heidi Langan as the Class Representative, and of Izard, Kindall & Raabe LLP as Class Counsel pursuant to Rule 23(g). *See* PA Order, ¶ 5. Plaintiff and her counsel have litigated the case through six years of pleadings, motions practice, discovery, an appeal and mediation, and have provided no reason to question either their ability or their determination to represent the best interests of the Class.

IV. THE COURT SHOULD CONFIRM THAT THE CLASS RECEIVED APPROPRIATE NOTICE OF THE SETTLEMENT

The standard for the adequacy of settlement notice in a class action is that of reasonableness. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005). "Notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y.2008).

Pursuant to Rule 23(c)(2)(B), the Notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The approved forms of Notice, (*see* Ex.'s 2 and 4 to the SA), satisfy each of these requirements. The Notice is written in plain English and organized so Class Members can clearly understand the terms of the Settlement and what they will receive if it is ultimately approved. The Notice clearly describes the terms of the Settlement, informs the Class Members about the allocation of attorneys' fees and costs, and provides specific information regarding the date, time,

and place of the final approval hearing and of Class Members' ability to object and exclude themselves from the settlement. *See* Ex. 2 of the SA.

Here, as in many similar consumer class actions, actual notice to each class member is not feasible because Defendant does not have records showing the people that purchased the Covered Products, much less their contact information. *See In re Initial Pub. Offering Securities Litig.*, 671 F. Supp. 2d at 488 n. 159 (finding "the Second Circuit has held that 'each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members.'") (quoting *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir.1988)). Pursuant to the Notice Plan approved by the Court, JND placed banner advertisements on Facebook and on the Google Ad Display Network that generated 141,984 of click-throughs, and issued a nationwide press release on February 21, 2019 to 11,000 English and 150 Spanish media outlets to assist in getting "word of mouth" out about the litigation. Keough Decl., ¶¶ 14, 16. JND provided a Settlement Website, http://www.aveenowashsettlement.com/, where class members could get additional information and fill out online claim forms, as well as toll-free telephone support. *See id.*, ¶22. The Settlement Website went live on February 14, 2019. The Settlement Website and the Class Notice could be viewed in either English or Spanish, which was also true of the online claim form available on the website. *Id.* As of May 15, 2019, the Settlement website has received 213,049 unique visitors, with total website page views exceeding 580,000. *Id.*, ¶ 24. Moreover, 190 people called the toll-free telephone support number. *Id.*, ¶ 21. On the basis of the Plan and the Class's response to the Plan, JND is highly confident that the proposed Notice Plan achieved the goal of reaching 70 percent of all Class Members. *Id.*, ¶ 32. Accordingly, the Court should find that the Class received proper notice of the Settlement.

V. THE COURT SHOULD APPROVE THE SETTLEMENT

Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class — or a class proposed to be certified for purposes of settlement — may be settled . . . only with the court's approval." *Id.* Importantly, courts and public policy considerations favor settlement, particularly in class actions. *See Wal-Mart Stores*, 396 F.3d at 116. However, "[b]efore such a settlement may be approved, the district court must determine that a class action settlement is fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000). "Fairness is determined upon review of both the terms of the settlement agreement and the negotiating process that led to such agreement." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal-Mart*, 396 F.3d at 116 (quoting *Manual for Complex Litigation (Third)* § 30.42 (1995)).

The recent amendments to Rule 23(e) codified caselaw interpreting the Rule 23(e) standard, direct courts to consider the following factors in determining whether a proposed settlement is "fair, reasonable and adequate:"

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3);[10] and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Reviewed in light of these standards, the proposed Settlement merits final approval.

A. Plaintiff and Class Counsel Have Diligently Prosecuted the Action and Negotiated the Settlement Agreement at Arm's Length

Courts examining the fairness of a settlement do so "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009) (internal quotation marks omitted). The Second Circuit has "recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement [is] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (alteration in original) (internal citation and quotation marks omitted). The presumption is strengthened where, as here, the settlement discussions are facilitated by a neutral mediator. *See, e.g., In re Sturm, Ruger, & Co., Inc. Sec. Litig.,* No. 3:09CV1293 VLB, 2012 WL 3589610, at *4 (D. Conn. Aug. 20, 2012) (noting that the involvement of a mediator in settlement negotiations "ensure that the proceedings were free of collusion and undue pressure") (internal quotations omitted).

[10] Rule 23(e)(3) requires counsel to identify "any agreement made in connection with the" proposed settlement. As there are no agreements other than the Settlement Agreement itself (*see* Kindall Decl., ¶ 11), Plaintiff does not address Rule 23(e)(2)(C)(iv) in the analysis of the adequacy of the Settlement.

Plaintiff and Class Counsel have diligently prosecuted this action for six years. Prior to filing the Complaint, Class Counsel engaged in extensive research concerning the nature and properties of the non-natural ingredients of the Covered Products, the pricing of the Covered Products relative to competitor products that were not marketed as "natural," and variations in state consumer protection laws around the country. Kindall Decl. ¶ 12. The resulting Complaint, and the subsequently filed Amended Complaint, were thus highly detailed. Plaintiff and Class Counsel successfully defeated Defendant's Motion to Dismiss, engaged in extensive discovery, reviewed over one hundred thousand pages of documents, retained a marketing expert and a damages expert, took and defended fact and expert depositions, successfully litigated a contested class certification motion, defeated a motion for summary judgment and myriad challenges to her experts' testimony. When the Second Circuit granted Defendant's request for an interlocutory appeal of the class certification ruling, Class Counsel successfully defended Plaintiff's Article III standing to sue on behalf a multistate class — an issue of first impression for the Second Circuit and one where district courts within the circuit had been trending in the opposite direction. *See Belfiore v. Procter & Gamble Co.*, 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015) (collecting and comparing cases).

As the history of the litigation suggests, every issue in the case was hard-fought. When the parties met to discuss Settlement, it was no different. The negotiations that finally resulted in the SA took place after several prior efforts had failed. *See* Kindall Decl. ¶ 3. The Parties retained Professor Eric Green to mediate the case after the Court's Omnibus Ruling in 2017 and met for a one-day mediation session in New York where the parties made progress but did not reach agreement. *Id.* at ¶ 5. Professor Green is recognized as "a highly experienced and very well-regarded mediator." *Fleisher v. Phoenix Life Ins. Co.,* 2015 WL 10847814, at *1 (S.D.N.Y. Sept.

9, 2015). However, the process was derailed when the Second Circuit granted Defendant's Rule 23(f) petition. Settlement discussions did not resume until after the Second Circuit issued its ruling in 2018. *Id.* at ¶ 9. The Parties scheduled another in-person mediation session with Professor Green for September 14, 2018, but failed to reach an agreement as that session as well. *Id.* The Parties agreed to continue their negotiations and exchanged additional offers and counteroffers through Professor Green in the following weeks. *Id.* at ¶ 10. In the end, Professor Green made a mediator's proposal of $2.4 million, which the Parties accepted on October 2, 2018. *Id.* Negotiation of the final text of the SA took over a month, but the agreement was signed by all parties on November 27, 2018, and submitted to the Court for preliminary approval on December 17, 2018. *Id.*; *see also* ECF No. 187.

Thus, settlement negotiations were conducted by highly qualified counsel who respectively sought to obtain the best possible result for their clients. The proposed settlement required two separate in-person mediation sessions with Professor Green as well as substantial follow-up, and it was informed by the exchange of significant information throughout the discovery and settlement process. Kindall Decl. ⁋ 3. Accordingly, the requirements of Rule 23(e)(2)(A) and (B) are met.

B. The Proposed Settlement Provides Adequate Relief

The amendments to Rule 23(e) direct the Court to consider the adequacy of the relief provided by the Settlement, taking into account several key factors: the costs, risks, and delay that would result from further litigation; the ability to distribute Settlement funds to the Class in an effective way; and the provisions of the Settlement related to attorneys' fees.

Here, the Settlement Amount is more than reasonable in light of considerations highlighted in Rule 23(e)(2)(C). Plaintiff's damages expert calculated the challenged "natural" representation

caused the price of the Covered Products to be inflated by approximately 10 percent, resulting in just under $4 million in damages to the Class over the Class Periods. Kindall Decl. ¶ 13. This damages calculation was done for purposes of litigation — it was the model that Plaintiff's expert submitted, defended in his deposition, and was prepared to testify to at trial, as well as the model the Court sustained in the face of a *Daubert* challenge. *Langan,* 2017 WL 985640, at *6–*7. The $2.4 million settlement represents approximately 60 percent of the actual damages sustained by the Class. Kindall Decl. ¶ 14. This is an outstanding result by any measure. Considered in light of the factors set forth in Rule 23(e)(2)(C), the adequacy of the Settlement is even more apparent.

1. The Cost, Risk and Delay of Further Litigation.

This litigation has been pending for over half a decade and involves complex legal and factual issues. However, in the absence of a settlement, there was still substantial work left to be done before the Class could obtain relief. The next step would have been Plaintiff's renewed Motion for Class Certification, which Defendant would likely have opposed, which would be costly and time-consuming for the Parties and the Court. The Parties then would have proceeded to trial, which would have involved considerable time and expense, especially since the case depended to a substantial degree on the testimony of experts. And, there is no reason to believe that the Party that was least satisfied with the results of the trial would not have taken an appeal. Simply put, "[l]itigation through trial would be complex, expensive, and long." *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *3 (E.D.N.Y. Nov. 16, 2012). Accordingly, the fact that the Settlement provides for a prompt payment to claimants favors approval of the settlement. *See Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707, at *10 (D. Conn. Nov. 3, 2016) (stating "the guaranteed payment of the settlement amount . . . 'increases the settlement's value in comparison to some speculative payment

of a hypothetically larger amount years down the road,' had the parties proceeded with litigation") (citing *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2004)).

Even more significant than delay and cost, however, is risk. "'Litigation inherently involves risks.'" *Willix v. Healthfirst, Inc.*, 2011 WL 7584862, at *4 (E.D.N.Y. Feb. 18, 2011) (quoting *In re PaineWebber*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997)). "One purpose of a settlement is to avoid the uncertainty of a trial on the merits." *Id.* Plaintiff believes in her case, and she has prevailed through years of challenges. Nonetheless, at trial Plaintiff bears the burden of establishing each element of her claim by a preponderance of the evidence. In a battle of experts, it is virtually impossible to predict with any certainty which expert's testimony would be credited and accepted by the fact-finder. *See In re PaineWebber*, 171 F.R.D. at 129 ("The issue would undoubtedly devolve into a battle of experts whose outcome cannot be accurately ascertained in advance.").

The fact-finder might choose to accept the opinions of Defendant's expert, Dr. Seggev, rather than Plaintiff's expert, Dr. Howlett, on the critical question of how consumers interpret the challenged "natural oat formula" representation. Similarly, even if Plaintiff prevailed on the issue of liability, the fact-finder might not accept Mr. Weir's damages calculations and instead credit the analysis of Defendant's expert, Dr. Ugone. While the Court denied Defendant's *Daubert* motions directed at both of Plaintiff's experts, the Omnibus ruling makes it clear that Defendant's arguments went to the weight that should be given to the opinions, and the trier of fact would be free to consider them at trial. *See, e.g., Langan,* 2017 WL 985640 at * 7 (although Weir's report sufficient to withstand *Daubert* challenge, Defendant "may forcefully argue that Weir's analysis

is significantly weakened because he did not conduct a more probing analysis to determine if all natural claims are understood the same way by consumers . . . .").

The Settlement avoids the costs, delays, and especially, the risks associated with continued litigation, while still obtaining approximately 60 percent of the amount Plaintiff's expert calculated for classwide damages. The determination of whether a settlement amount is reasonable "does not involve the use of a mathematical equation yielding a particularized sum." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotation marks omitted). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972)). The adequacy of a settlement amount offered should be judged "in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Med. X-Ray*, 1998 WL 661515, at *5 (E.D.N.Y. Aug. 7, 1998). Because a settlement provides certain and immediate recovery, courts often approve settlements even where the benefits obtained as a result of the settlement are less than those originally sought. As the Second Circuit stated, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth of a single percent of the potential recovery." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 445 n.2 (2d Cir. 1974) *abrogated on other grounds*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir.2000).

The level of recovery provided by this Settlement far exceeds recoveries in other class action settlements. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (noting that "a 9 percent settlement . . . is still within the range of reasonableness" in a consumer class action); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011)

(approving settlement representing 10% of maximum damages and noting that "[n]umerous courts have approved settlements with recoveries around (or below) this percentage"); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d at 483 (approving settlement with 2% recovery of maximum damages).

2. The Settlement Funds Can Be Distributed to the Class in an Effective Way.

Paragraph (C)(ii) of Rule 23's new subdivision (e)(2) directs attention to whether there is an effective mechanism for distribution of settlement funds to the class:

> Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Federal Rule of Civil Procedure 23, Advisory Committee Notes to the 2018 Amendments, Subdivision (e)(2), Paragraphs C & D. The Settlement provides for a simple and effective claim filing and processing mechanism. Class Members are required to file a claim, which is necessary since there is no way for Johnson & Johnson to determine the identity of the consumers who purchased the Covered Products.

The approved claim form is simple and straightforward, requiring only that the Class Member provide contact information, state the number of bottles of each of the two types of Covered Products purchased in the specified class states during the applicable periods, and sign and date the form. *See* Ex. 1 to the SA. Because the case involves relatively inexpensive consumer products, and because the class period ended over five years ago, it is unreasonable to expect that Class Members retained proofs of purchase. Accordingly, the claim form permits Class Members to claim up to fifteen purchases per household without providing any proof of purchase. *Id.; see also* Ex. 2 to the SA at 4. The claim forms could be downloaded from the Settlement Website in either English or Spanish or mailed upon request. *See* Keough Decl., ¶ 22. Additionally, Class

Members could simply fill out an electronic claim form on the Settlement Website, https://secure.aveenowashsettlement.com/. *Id.*

The efficacy of the claim process employed here is shown by the volume of claims submitted to date. As of last count, 80,089 Class Members have submitted online claim forms, while an additional 132 Class Members have submitted printed claim forms. *Id.*, ¶ 30.

Payment of the claims will likewise be straightforward. JND will need to work to ensure that members of the same household did not submit duplicate claims and will need to finalize the total number and value of all approved claims. The amount of each claim will then be adjusted, up or down, so that the total amount paid to the Settlement Class will equal the amount remaining in the Settlement Fund after payment of any charges, taxes, the costs of notice and claims administration, a service award to the Lead Plaintiff, and attorneys' fees and expenses. *See* SA at 14–15. JND will send checks in the amounts calculated to all Class Members who timely submitted approved claims to the addresses provided on the claim forms, which shall be negotiable for 120 days. *See id.* Thus, the Settlement provides for a streamlined and effective way to get the settlement money to the Class, which supports a determination of adequacy under Rule 23(e)(2)(C).

3. The Provisions of the Settlement Related to Attorneys' Fees Further Demonstrate the Adequacy of the Settlement

The SA provides that Class Counsel may apply to the Court for an award of Attorneys' Fees not to exceed 30 percent of the $2.4 million settlement, to be paid from Settlement Fund. *See* the SA at 27. The SA also expressly provides that the Court's determination with respect to the application for attorneys' fees does not affect the validity of the Settlement Agreement itself. *Id.* at 30. Thus, the Court is free to award the amounts requested, a lesser amount, or nothing at all, while still approving the SA. *See, e.g., Adams v. Cradduck,* 2016 WL 7664135, at *6 (W.D. Ark.

Nov. 17, 2016) (noting with approval that "class counsel's compensation is not set by the settlement but will be determined by petition to the Court.").

Class Counsel has requested that the Court award a fee of $720,000. The reasonableness of this requested fee, pursuant to the standards that govern such awards, is addressed at length in Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and a Lead Plaintiff Service Award, which is filed contemporaneously with this Motion. For purposes of analyzing whether the fee request suggests some deficiency in the adequacy of the Settlement itself, it is sufficient to note that the requested fee is reasonable and consistent with (or lower than) awards in other cases. *See, e.g., Bozak v. FedEx Ground Package Sys., Inc.*, 2014 WL 3778211, at * 7 (D. Conn. July 31, 2014) ("The one-third amount that plaintiffs request is typical of awards in this Circuit."); *Capsolas v. Pasta Res. Inc.*, 2012 WL 4760910, at *8 (S.D.N.Y. Oct. 5, 2012) ("Class counsel's request for one-third of the Fund is reasonable and consistent with the norms of class litigation in this circuit") (internal quotation omitted); *Willix*, 2011 WL 754862, at *7 (same).[11]

Moreover, the requested fee is substantially below Class Counsel's lodestar. As the district court observed in *In re NTL Inc. Sec. Litig.,* 2007 WL 1294377 (S.D.N.Y. May 2, 2007), in the normal class action case, "the multiplier applied to the lodestar typically is positive, to account for the contingent nature of the engagement and the risk of such a case" and a negative lodestar clearly brings no "windfall" to Class Counsel. *Id.*, at *8. Class Counsel alone spent over 2000 hours of attorney time on this litigation, generating a lodestar, at counsels' normal hourly rates, of $1,309,812.50. Under the lodestar approach, Class Counsel has a ***negative*** lodestar multiplier –

[11] *See also Mohney v. Shelly's Prime Steak, Stone Crab & Oyster Bar*, 2009 WL 5851465, at *5 (S.D.N.Y. Mar. 31, 2009) (noting that "Class Counsel's request for 33% of the Settlement Fund is typical in class action settlements in the Second Circuit."); *Gilliam v. Addicts Rehab. Ctr. Fund*, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008) (fee equal to one-third of the settlement fund is reasonable and "consistent with the norms of class litigation in this circuit") (citing cases).

the requested fees are 45 percent lower than counsel's lodestar. *See In re Blech Sec. Litig.*, 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000) (awarding lead counsel 30% of the settlement and confirming that the award was reasonable because it represented a negative multiplier of lead counsel's lodestar). Accordingly, the Settlement terms related to attorneys' fees support a determination of adequacy and approval of the SA.

C. The Settlement Treats Class Members Equitably Relative to Each Other

Rule 23(e)(2)(D) requires the Court to consider whether the Settlement treats Class Members equitably relative to each other. Here, the proposed Settlement treats all Class Members the same. Every Class Member can claim up to fifteen purchases with no proof of purchase, and there is no limit to the amount of purchases that any Class Member can claim if they have proofs of purchase. While it is certainly true that Class Members did not all buy the same number of Covered Products, it is equally true that Class Members without proofs of purchase would face the same difficulties in establishing the volume of their purchases in a contested case. The method of allocating the Settlement funds set out in the Notice is thus fair and equitable to all Class Members.

The Settlement also does not unduly favor Lead Plaintiff and Class Representative, Heidi Langan, who ***may,*** if the Court elects to approve it, receive a modest service award of $5,000 for her efforts on behalf of the Class. *See In re Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d 344, 354 (S.D.N.Y. Jul. 8, 2014) (providing a $5,000 incentive award for each of the named plaintiffs where those plaintiffs participated in the litigation, reviewed filings and "communicated regularly with Class Counsel"); *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 245 (E.D.N.Y. 2010) (granting a $5,000 incentive award for a named plaintiff who "reviewed the complaint in the California Action and discussed the facts with counsel"); *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 2013 WL 12091355, at *2 (S.D.N.Y. Apr. 8, 2013) (awarding

$259,610 to one plaintiff and $125,688 to a second plaintiff), *aff'd*, 772 F.3d 125 (2d Cir. 2014); *Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 27 (S.D.N.Y. 2016) (awarding $130,323 to sole lead plaintiff); *see also Calogiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (affirming decision to give case contribution awards of $10,000 to each of the plaintiffs); *Martinez v. Medicredit, Inc.*, 2018 WL 2223681, at *5 (E.D. Mo. May 15, 2018) (awarding class representatives $7,500 each for their contributions); *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at * 6 (M.D.N.C. Sep. 29, 2016) (awarding each class representative $25,000); *Prater v. Medicredit, Inc.*, 2015 WL 8331602, at *4 (E.D. Mo. Dec. 7, 2015) (awarding $20,000). Ms. Langan has represented the Class through six years of litigation. She reviewed the Complaint before it was filed and received periodic updates concerning the litigation. Kindall Decl., ¶ 15; *see Langan,* 2017 WL 985640, at *12. Ms. Langan also responded to discovery, was deposed, and discussed the proposed Settlement terms with Class Counsel. *Id.* The proposed award, if granted, is more than justified by her efforts on behalf of the Class.

D. The Reaction of the Class is Overwhelmingly Positive

Although amended Rule 23(e)(2) does not address the response of Class Members to the Settlement, courts have generally considered their reaction when deciding approval. *See Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy") (citing *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (citation omitted)). There is a "strong indication of fairness" where the "vast majority of class members neither objected nor opted out." *Silverstein v. AllianceBernstein, L.P.*, 2013 WL 7122612, at *5 (S.D.N.Y. Dec. 20, 2013) (citation omitted).

Here, the reaction of the Class Members to the Settlement has been overwhelmingly positive. The deadline for filing claims, objecting or opting out of the Settlement has not yet

passed. To date, however, only one (1) Class Member has elected to opt out and none have filed objections. Keough Decl., ¶¶ 26, 28. In contrast, over ***eighty thousand*** Class Members have filed claims. *Id.*, ¶ 30. This exceptional participation rate and lack of objections from the Settlement Class leaves no question that Class Members view the Settlement favorably, which provides additional support for approval of the Settlement, especially when considered with the facts discussed above in the Rule 23(e)(2) analysis. *See Massiah v. MetroPlus Health Plan, Inc.,* 2012 WL 5874655, at *4 (E.D.N.Y. 2012) ("The fact that the vast majority of class members neither objected nor opted out is a strong indication of fairness.").

Taken as a whole and considered in light of all of the factors set forth in Federal Rule of Civil Procedure 23 as well as caselaw, the proposed Settlement is a very good result for the Class and merits approval by the Court.

VI. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court (1) certify the Settlement Class for settlement purposes only; (2) determine that the Class has received full and adequate notice of the Settlement; and (3) approve the proposed Settlement Agreement.

Dated: May 27, 2019

Plaintiff,

By: */s/ Mark P. Kindall*

Mark P. Kindall
Robert A. Izard
Izard, Kindall & Raabe, LLP
29 South Main Street Suite 305
West Hartford, CT 06107

Nicole Anne Veno
Law Office of Nicole A. Veno, LLC
PO Box 150555
Brooklyn, NY 11215